

Supreme Court, U.S.
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No. 83-950

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL E. MOSS,

Petitioner,

v.

JAMES M. NEWMAN,

Respondent.

**REPLY BRIEF OF PETITIONER MICHAEL E.
MOSS IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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TABLE OF AUTHORITIES

CASES:	Page
<i>Affiliated Ute Citizens v. United States</i> , 406 U.S. 128 (1972)	3
<i>Blue Chip Stamps v. Manor Drug Stores</i> , 421 U.S. 723 (1972)	3, 4
<i>Chiarella v. United States</i> , 445 U.S. 222 (1980)	1, 2
<i>Dirks v. SEC</i> , 77 L.Ed.2d 911 (1983)	1, 2
<i>In re Investors Management Co.</i> , 44 SEC 633 (1971) .	2
<i>Shapiro v. Merrill Lynch Pierce Fenner & Smith, Inc.</i> , 495 F.2d 228 (2d Cir. 1974)	3
<i>United States v. Newman</i> , 664 F.2d 12 (2d Cir. 1981) .	4

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In his Brief in Opposition, Respondent James M. Newman claims that the Petition does not in any respect present the misappropriation issue left undecided in *Chiarella v. United States*, 445 U.S. 222 (1980), but rather represents a narrower question of Petitioner's standing to sue for damages under Section 10(b). Respondent also claims that the theory advanced by Petitioner is in direct conflict with *Chiarella* and *Dirks v. SEC*, 77 L.Ed.2d 911 (1983).

Respondent misstates the holdings of the Court in *Chiarella* and *Dirks*, by contending that the issue presented here is in direct conflict with those decisions. As indicated in the Petition, the misappropriation theory was not expressly ruled on by the Court in those cases, nor did the Court consider the theory in the context of a private civil action.

The requirement of a relationship of trust and confidence between Petitioner and Respondent is *not the exclusive way* in which there exists a duty to disclose. This seems apparent from the concurring and dissenting opinions in *Chiarella*. Further, nothing in *Dirks* indicates that the existence of a fiduciary relationship is an absolute requirement for a duty to disclose. Rather, the opposite appears to be the case. *Dirks*, 77 L.Ed.2d at 928-29. ("Nor did *Dirks* misappropriate or illegally obtain the information about Equity Funding.")¹

The misappropriation theory states that a person who has misappropriated nonpublic information has *an absolute duty* to disclose that information or to refrain from trading. *Chiarella*, 445 U.S. at 240. If Respondent has that absolute duty to disclose, the question is to whom is such duty owed? The answer can only be to those investors who were selling Deseret securities when Respondent was in the marketplace purchasing those securities.² Those sellers did not have the information Respondent possessed; if they had, they undoubtedly would not have sold their stock. The *Cady Roberts* duty to disclose is owed to shareholders of the corporation impacted by the nondisclosure and subsequent trading. See *Dirks*, 77 L.Ed.2d at 922, 925-27, 929. These investors

¹ The concurring opinion of SEC Commissioner Smith in *In re Investors Management Co.*, 44 SEC 633 (1971), relied on by the Court in *Dirks*, also recognizes a misappropriation of corporate information by one without a special relationship as being a violation of Section 10(b). 44 SEC at 650 n.2.

² It would be illogical to conclude that the duty to disclose is owed to Respondent's employer, from whom the information about the tender offer was misappropriated, because it already was aware of the information.

can show the requisite causation and injury as a result of Respondent's failure to disclose.³

Not applying the misappropriation theory to this case would permit Respondent and those like him to capitalize on their fraud; it would allow Respondent to cheat and benefit personally without fear of having to pay his profits to those injured investors. Such a result is socially undesirable since it reduces a major deterrent to this sort of white collar crime. Such a result violates principles of standing and causation which allow persons directly impacted by another's conduct to maintain a claim for relief. Respondent could effectuate his illegal stock purchases of Deseret only through willing sellers of the securities who did not have the information about the tender offer which he possessed. Petitioner and other sellers of Deseret securities were those directly aimed at or within the target area of Respondent's conduct.

There are numerous situations where investors might be injured by the misappropriation of confidential in-

³ See *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972); *Shapiro v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 495 F.2d 228, 238-41 (2d Cir. 1974). Respondent appears to contend that Petitioner is not a person defrauded by Respondent's conduct. This assertion is incorrect. Respondent's misappropriation of material nonpublic information and trading in securities based on that misappropriation defrauds not just his employer from whom the information was purloined, but also investors such as Petitioner who were in the market selling the stock Petitioner was purchasing. Under these circumstances, Petitioner should not be barred from pursuing relief because he lacks a pre-existing relationship with Respondent or because he did not trade in privity with Respondent. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 745 (1975) ("in today's universe of transactions governed by the 1934 Act privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule").

formation by those in positions to misappropriate such information; for instance, a law clerk who misappropriates and trades based on information about a soon to be released judicial opinion of great import to a publicly traded company, and, a government official who misappropriates and trades based on information about a soon to be announced Government contract of tremendous magnitude to the contractor who will be awarded the contract. To not adopt the misappropriation theory in this case, and in the situations presented above, leaves investors with no recourse to recover for injuries they incur directly as a result of trading based on the misappropriation of material nonpublic information.⁴

This Court, the SEC, and virtually every person writing on securities laws has recognized that a major purpose of those laws is to protect investors, persons like Petitioner here, who are injured by fraudulent conduct of persons like Respondent. The standing limitation set forth in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), restricting suits under Section 10(b) to purchasers or sellers of securities, is satisfied here. No other artificial

⁴ Under the misappropriation theory adopted in *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), Respondent was convicted of a criminal offense. However, the number of such criminal cases being brought is obviously quite small and provide no relief for investors injured by the unlawful conduct.

barrier to Petitioner's claim should be imposed. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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